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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1055

NATHAN CARL SCHWARTZ,

Petitioner,

against

HEYDEN NEWPORT CHEMICAL CORPORATION and HEYDEN CHEMICAL CORPORATION,

Respondents.

BRIEF FOR RESPONDENT HEYDEN NEWPORT CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Opinions Below and Jurisdiction

The opinions below and the grounds on which this Court's jurisdiction is invoked are as set forth in the petition.

Statute and Constitutional Provision Involved

The New York statute involved in this case is the following portion of the New York Civil Practice Act, Section 49:

> "§49. Actions to be commenced within three years.

"The following actions must be commenced within three years after the cause of action has accrued:

* * * * *

"6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence."

The constitutional provision involved is the following provision of the Fourteenth Amendment to the Constitution of the United States:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Question Presented

The question presented is whether it is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution for a state statute of limitations to provide that the period of limitations for a cause of action to recover damages alleged to have resulted from the use of a harmful product in the medical treatment of the plaintiff commences at the time that the allegedly harmful product was inserted and left in the plaintiff's body, rather than at the time that the plaintiff subsequently learned that he had suffered consequential injury therefrom.

A subsidiary issue presented is whether in such a case, where the plaintiff's cause of action is predicated upon the affirmative allegation in the complaint that the product was harmful and unfit for human use at the time it was inserted and left in his body, the plaintiff is denied due process of law by a holding of the state court, without a trial, that the administration and use of such product as alleged in the complaint constituted an "injury" to him within the meaning of the state statute of limitations.

Statement of the Case

In this action, instituted in the Supreme Court, New York County, plaintiff seeks to recover damages alleged to have been sustained by him as a result of the insertion into his sinuses, in the year 1944 while he was in the armed forces, during the course of sinus X-rays taken at a naval hospital, of a product called "Umbrathor". The complaint alleges that this product was manufactured by defendant,[1] was radioactive and was employed in hospitals and medical practices for the purpose of making sinuses perceptible in sinus X-rays.

Plaintiff alleges that a portion of the product so inserted at the naval hospital in 1944 "was not removed from plaintiff's person and continued to remain in parts of his head" and caused a cancerous condition for which he was operated on in 1957.

The complaint alleges three causes of action, each of which is based on the same facts but expresses a somewhat different legal theory. The complaint alleges in the first cause of action that defendant was "negligent" in marketing the product "which it knew or should have known" was "unfit for use", in the second cause of action that defendant publicly represented that the product was "fit for use on the human being" and this representation was "false", and in the third cause of action that defendant "warranted" that the product was "fit for human use" and plaintiff was damaged as a result of the "breach of warranty".

In none of the causes of action is any act alleged on the part of the defendant subsequent to the year 1944. The action was begun by service of a summons on November

1. "Heyden Chemical Corporation", named in the caption, is the former name of the defendant-respondent, Heyden Newport Chemical Corporation.

20, 1959, fifteen years after the alleged acts of defendant and the alleged use of and failure to remove the product by the naval hospital.

The Supreme Court, New York County, dismissed the complaint on the ground that the causes of action stated in the complaint are barred by the New York statute of limitations. This order was affirmed by the Appellate Division, First Department, and by the Court of Appeals of the State of New York. The New York courts held that both the plaintiff's cause of action for negligence and his causes of action for breach of warranty arose in 1944 when the allegedly harmful product was inserted and left in plaintiff's sinuses by the naval hospital. In the petition for certiorari, plaintiff refers only to the negligence cause of action and does not make any reference to the breach of warranty causes of action. Accordingly, it appears it is only as the New York State statute of limitations has been construed and applied by the Court of Appeals in the negligence cause of action that petitioner contends the statute is repugnant to the Fourteenth Amendment. However, it is believed that the arguments advanced in this brief would be equally applicable if petitioner intended his arguments to be addressed also to the application of the statute of limitations for breach of warranty, the text of which is set forth in the footnote.[1]

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1. Section 48 of the New York Civil Practice Act provides in part as follows:

> "§48. Actions to be commenced within six years.
>
> "The following actions must be commenced within six years after the cause of action has accrued:
>
> "1. An action upon a contract obligation or liability express or implied, except a judgment and except as provided by section forty-seven and forty-seven-a."

POINT I

No federal question of substance is presented by the determination of the New York courts that, under the New York statute of limitations, plaintiff's cause of action arose at the time the allegedly harmful product was inserted and left in his sinus by the naval hospital, rather than at the time he subsequently learned he had suffered consequential damage therefrom.

The question as to when a cause of action for medical malpractice or other negligent action, as a result of which some harmful product is inserted and left in the plaintiff's body, is deemed to have accrued for purposes of statutes of limitations has been the subject of extensive consideration by the courts and legislatures of the states.

The decision of the New York Court of Appeals in the present case follows a long and unbroken line of earlier decisions in that state, in all of which the courts held that the cause of action accrues on the date of the alleged introduction of the harmful material into the human body or other wrongful act of the defendant, rather than upon the date that the plaintiff learns of the wrong or suffers consequential injury therefrom. *Conklin* v. *Draper*, 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dept. 1930), aff'd 254 N. Y. 620 (1930); *Schmidt* v. *Merchants Despatch Trans. Co.*, 270 N. Y. 287 (1936); *Golia* v. *Health Insurance Plan of Greater N. Y.*, 6 A. D. 2d 884, 177 N. Y. S. 2d 550 (2d Dept. 1958), aff'd 7 N. Y. 2d 931 (1960);

Dorfman v. *Schoenfeld*, 26 Misc. 2d 37, 203 N. Y. S. 2d 955 (Sup. Ct. N. Y. Co. 1960); *Flynn* v. *New York Hospital*, 224 N. Y. S. 2d 881 (Sup. Ct. Queens Co. 1962).

In 1962 the New York legislature adopted as part of the new Civil Practice Law and Rules a provision extending the present two-year statute of limitations for malpractice[1] to three years.[2] This change was based upon a study by agencies of the Legislature which gave as the reason for the change that "in many actions for malpractice the effect of the tort and the fact that it has occurred is not known promptly to the person injured."[3] At the same session, the Legislature did not enact bills introduced upon the recommendation of the New York Law Revision Commission[4] which provided that a cause of action for malpractice should not be deemed to have accrued until discovery by the injured party of the facts constituting the malpractice, but that in any event no action could be commenced after six years after the occurrence of the malpractice.[5]

Petitioner cites (petition, page 9) decisions of courts of five states in which it has been held that the statute of limitations in such cases does not run until the date of discovery of the injury, but the great weight of authority in the state courts is to the contrary, and we cite in the footnote below decisions by the courts of sixteen other states—Alabama, Arkansas, Montana, Georgia, Illinois, Iowa, Kansas, Kentucky, Massachusetts, North Carolina, Ohio, Tennessee, Texas, Vermont, Washington and West

1. Civil Practice Act §50(1).
2. Civil Practice Law and Rules, §214(6), Chapter 308, Laws of 1962.
3. N. Y. Leg. Doc. 13 (1958), at p. 538.
4. N. Y. Leg. Doc. 65 (C) (1962).
5. 1962 New York Legislative Record Index 164 (Sen. Intro. 1780) 538 (Assembly Intro. 1939).

Virginia—all of which are in accord with the New York rule.[1]

It is also of interest that in recent years two states, Alabama and Connecticut, have adopted amendments to their statutes of limitations putting into effect the "discovery" rule for determining the commencement of the period of limitations, but that in the case of the Connecticut statute there is provided an overall limitation of only three years from the date of the act or omission complained of (Conn. Gen. Stat., ch. 926 §52-584 (1958)),

1. In each of the following cases, it was held that the period of limitations began to run when the facts constituting the cause of action took place, rather than when such facts became known to the plaintiff. *Hudson* v. *Moore*, 239 Ala. 130, 194 So. 147 (1940) (gauze sponge left in patient's body during gall bladder operation); *Steele* v. *Gann*, 197 Ark. 480, 123 S. W. 2d 520 (1939) (gauze sponge left in gall bladder cavity during operation); *Field* v. *Gazette Publishing Co.*, 187 Ark. 253, 59 S. W. 2d 19 (1933) (lead poisoning resulting from linotype operation); *Coady* v. *Reins*, 1 Mont. 424 (1872) (negligence in treatment of fractured and dislocated arm and elbow); *Saffold* v. *Scarborough*, 91 Ga. App. 628, 86 S. E. 2d 649 (1955) (burns resulting from radium treatment); *Gangloff* v. *Apfelbach*, 319 Ill. App. 596, 49 N. E. 2d 795 (1943) (nerve injury and partial paralysis resulting from operation on fractured arm); *Ogg* v. *Robb*, 181 Iowa 145, 162 N. W. 217 (1917) (cancer resulting from excessive X-rays); *Waddell* v. *Woods*, 160 Kan. 481, 163 P. 2d 348 (1945) (burns resulting from X-ray treatment); *Carter* v. *Harlan Hospital Ass'n.*, 265 Ky. 452, 97 S. W. 2d 9 (1936) (forceps left in patient's abdomen); *Capucci* v. *Barone*, 266 Mass. 578, 165 N. E. 653 (1929) (sponge left in patient's abdomen); *Shearin* v. *Lloyd*, 246 N. C. 363, 98 S. E. 2d 508 (1957) ("lap pack" left in abdomen during appendectomy); *De Long* v. *Campbell*, 157 Ohio St. 22, 104 N. E. 2d 177 (1952) (sponge left in patient's abdomen); *Brown* v. *Tennessee Consol. Coal Co.*, 83 S. W. 2d 568 (Ct. App. Tenn. 1935) (silicosis caused by inhalation of dust); *Carrell* v. *Denton*, 138 Tex. 145, 157 S. W. 2d 878 (1942) (gauze sponge left in incision during spinal operation); *Murray* v. *Allen*, 103 Vt. 373, 154 A. 678 (1931) (surgical gauze left in patient's abdomen); *Lindquist* v. *Mullen*, 45 Wash. 2d 675, 277 P. 2d 724 (1954) (sponge left in incision during gall bladder operation); *Scott* v. *Rinehart & Dennis Co.*, 116 W. Va. 319, 180 S. E. 276 (1935) (silicosis caused by inhalation of rock dust).

and the Alabama statute provides for an overall limitation of six years from the date of the act or omission complained of (Ala. Code, 1958, Title 7, §25 (1)). It will be noted that neither of these statutes provides any such extension as would be necessary in order to sustain the complaint in the present case, and the extension for non-discovery under the Connecticut statute results in a maximum period only equal to the three-year period provided by the New York statute.

Petitioner is in effect contending, in the present case, that this Court under the guise of enforcing the due process clause of the Fourteenth Amendment should reach its own decision as to what is the proper statute of limitations in such cases, and should adopt, as the only rule permissible under the Constitution, a rule which would permit petitioner to have brought the present action fifteen years after the allegedly harmful product was inserted and left in his sinuses by the naval hospital.

It is obvious that the due process clause imposes no such inherently legislative function upon this Court. This Court has always recognized that the fixing of periods of limitation is necessarily a legislative rather than a judicial function. As this Court said in *Chase Securities Corporation* v. *Donaldson*, 325 U. S. 304, 314 (1945):

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S.

> 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate."

In *Kavanagh* v. *Nobel*, 332 U. S. 535 (1947), this Court enforced a two-year statute of limitations upon a claim for tax refund despite the fact that the claimant's failure to claim a refund within the two-year period was due to an invalid Treasury regulation subsequently set aside by the courts. In enforcing the two-year period of limitations, this Court said (p. 539):

> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Rosenman* v. *United States*, 323 U. S. 658, 661. Remedies for resulting inequities are to be provided by Congress, not the courts."

Even in cases where states have gone so far as to abolish long standing common law remedies or rules, this Court has found that no constitutional principles were violated. *Silver* v. *Silver*, 280 U. S. 117 (1929) (abolition of automobile guest actions); *Second Employers' Liability Cases*, 223 U. S. 1 (1912), *New York C. R. Co.* v. *White*, 243 U. S. 188 (1917) (abolition of fellow servant and assumption of risk rules). And, despite the importance of the due process clause in criminal cases, that clause does not require in such cases that one rule, because believed by this Court to be wiser or fairer than another, be adopted by all states. Thus, in *Leland* v. *Oregon*, 343 U. S. 790 (1952), an Oregon statute provided that the defense of insanity of the defendant must be proven

beyond a reasonable doubt. The rule in federal criminal cases, as enunciated by this Court, was to the contrary, placing no such burden of proof on the defendant. Twenty states placed the burden on defendant, although not requiring proof beyond a reasonable doubt. This Court held that the Oregon statute did not violate the due process clause, saying, in part:

> "• • • The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'
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> • • • • •
>
> "• • • In *Davis* v. *United States, supra,* we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But '[i]ts procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' *Snyder* v. *Massachusetts, supra,* at 105. 'The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.' MR. JUSTICE FRANKFURTER, concurring in *Malinski* v. *New York,* 324 U. S. 401, 417 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy

violates generally accepted concepts of basic standards of justice." (343 U. S. 798, 799.)

In the present case the rule applied by the New York courts follows the most widely accepted standard in such cases for dealing with the accrual of a cause of action for limitations purposes (see cases cited in footnote, p. 7, *supra*).

Wheeler v. *Jackson*, 137 U. S. 245 (1890), cited by petitioner (petition, page 6) is not pertinent to the question here presented. Petitioner has omitted from his quotations from that case language which significantly qualifies the meaning of this Court's opinion in that case. The full quotations, with the portions omitted by petitioner shown in italics, are as follows (137 U. S. at pp. 255, 258):

> "* * * It is the settled doctrine of this court that the Legislature may prescribe a limitation for the bringing of suits *where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced*, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given *by the new law* for the commencement of suit before the bar takes effect."
>
> "* * * A Statute of Limitation cannot be said *to impair the obligation of a contract, or* to deprive one of property without due process of law, unless, *in its application to an existing right of action*, it unreasonably limits the opportunity to enforce that right by suit."

As can be seen from the language which petitioner carefully deleted from his quotations, the *Wheeler* case dealt with the problem of shortening of existing statutes of limitation so as to affect causes of action which had already accrued, and not with any question as to whether a statute of limitations already in existence at the time the cause of

action accrued was "reasonable." In that case the question was whether shortening of the time to commence suit on state-created contracts impaired the obligation of such contracts. Here, there has been no shortening of the period of limitations or other adverse change; the rules applicable to this case have remained unchanged at least since 1936, when *Schmidt* v. *Merchants Despatch Transp. Co.*, 270 N. Y. 287, was decided. Petitioner's "property," if his cause of action can be so considered, was at all times subject to settled rules of law limiting the time to bring an action; no state action reduced that time or otherwise affected his remedy.

Petitioner cites (petition, page 7) *Urie* v. *Thompson*, 337 U. S. 163, in support of the "discovery" rule he contends should be applied. But that case dealt with the Federal Employers Liability Act, and differing questions of statutory interpretation of the term "injury" as used in the Act led to the Court's basic conclusion that occupational disease itself, when manifested, constituted injury for limitations purposes. (337 U. S. at 169-170.) No constitutional question was presented or decided; at the most, the *Urie* case adopts the view taken by some state courts that a negligence or malpractice cause of action accrues from the time of discovery, but as we have shown the great majority of the state courts are in accord with the New York rule (see footnote, p. 7, *supra*).

Petitioner cites no case, and we know of none, which lends any actual support to petitioner's contention that this Court should decide, as a matter of due process of law, whether in its opinion a state statute of limitations is "reasonable" as such. Obviously, what the period of limitations should be for any particular type of cause of action, when it should be held to start to run, and whether or to what extent it should be tolled for non-

discovery or by reason of other circumstances, are all matters for legislative determination. The fixing of the period of the statute of limitations as applied in any particular situation is always a problem of balancing two opposing considerations, the desire to permit claimants to have their day in court and the recognition that stale claims should be outlawed. The balancing of these opposing considerations in any particular type of situation and the fixing of a specific number of years after which the interest against stale claims outweighs the interest in favor of permitting claims to be asserted, is a task which it is impossible for a court to perform and has always, therefore, been recognized as a peculiarly legislative function.

This Court has recently emphasized that, in determining whether state laws violate the due process clause, it does not attempt to determine the "reasonableness" of such laws. *Ferguson* v. *Skrupa*, decided April 22, 1963. In that case the Court said:

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. • • • This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis.
>
> • • •
>
> "We have returned to the original constitutional position that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

It is not necessary in the present case to determine whether there might be some circumstance where a statute

of limitations, as applied to causes of action arising after its enactment, might be held to violate the due process clause on the ground that it was so arbitrary and capricious as to amount to a deprivation of property without due process of law. Here the New York court has not reached any extraordinary or unusual result, but has merely followed its own long-established line of decisions, which accord with the overwhelming weight of authority of the other state courts, and the New York legislature has not acted arbitrarily or capriciously, but has only recently reconsidered this particular subject and made what it considered an appropriate change in the statute of limitations. Indeed, even the view that there should be some tolling of the statute of limitations for non-discovery, as advanced to the New York legislature and as reflected in the other state statutes referred to above, would not go as far as it would be necessary to go in the present case in order to permit this petitioner to bring a cause of action fifteen years after the allegedly harmful product was used by the naval hospital in treating petitioner.

POINT II

Since plaintiff's complaint alleges that the substance inserted and left in his body was radioactive, carcinogenic and unfit to be inserted in human beings, the state court could properly determine as a matter of law that "injury" occurred when the substance was inserted and left in his body, and plaintiff is not thereby denied due process of law.

Petitioner further attacks the decision of the New York Court of Appeals on the ground that he was not given an opportunity to be heard as to when injury was sustained by him.

Petitioner's own complaint, taken as true on the motion to dismiss, alleges that Umbrathor was "radioactive and carcinogenic and therefore unfit to be inserted in, or injected into human beings." These allegations were not mere surplusage; they were essential allegations in order for the complaint to state any cause of action against the defendant. On this basis, and in view of the clear precedent of *Schmidt* v. *Merchants Despatch Transp. Co.*, 270 N. Y. 287 (1936), and the other New York cases cited above, the Court of Appeals was fully warranted in concluding that "injury", within the meaning of the New York statute of limitations, occurred when the harmful substance was inserted and left in petitioner's body by the naval hospital in 1944. The hearing which petitioner claims he should have would be meaningful only if the applicable rule of law were different; i.e., that injury occurred only when the consequential disease of cancer first manifested itself to him. Thus, petitioner is in effect merely restating his first ground for review.

The decision of the Court of Appeals was based upon the essential facts as pleaded by petitioner himself, and he cannot complain that he was deprived of a hearing by reason of the application of an established rule of law to those essential facts.

CONCLUSION

No federal question of substance is presented. There is no reason for granting a writ of certiorari.

Respectfully submitted.

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